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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 LORI MCGRATH,

8 Plaintiff(s),

9 v.

10 LIBERTY MUTUAL FIRE INSURANCE
11 COMPANY,

12 Defendant(s).

Case No. 2:19-CV-36 JCM (CWH)

ORDER

13
14 Presently before the court is Liberty Mutual Fire Insurance Company's ("defendant")
15 motion for summary judgment. (ECF No. 23). Lori McGrath ("plaintiff") filed a response (ECF
16 No. 30), to which defendant replied (ECF No. 33).

17 **I. Background**

18 The instant action involves a dispute regarding plaintiff's eligibility for uninsured
19 motorist insurance benefits. (ECF No. 1-1). Plaintiff was a passenger in non-party Richard
20 McCann's car. (ECF No. 23 at 4). McCann had an insurance policy through non-party State
21 Farm. *Id.* Non-party Michael Honma—who was also insured by State Farm—struck plaintiff
22 and McCann. (ECF No. 30 at 5). State Farm paid plaintiff \$25,000 under Honma's liability
23 insurance and another \$100,000 under McCann's underinsured-uninsured coverage. *Id.*

24 Plaintiff had two insurance policies with defendant, which included underinsured
25 motorist insurance benefits, each with a \$100,000 limit. (ECF No. 1-1 at 3). Plaintiff's policy
26 included the following "other insurance" provision:

27 **OTHER INSURANCE IF THERE IS OTHER APPLICABLE**
28 **INSURANCE AVAILABLE UNDER ONE OR MORE**
POLICIES OR PROVISIONS OF COVERAGE:

1
2 **1. ANY RECOVERY FOR DAMAGES UNDER ALL SUCH**
3 **POLICIES OR PROVISIONS OF COVERAGE MAY**
4 **EQUAL BUT NOT EXCEED THE HIGHEST APPLICABLE**
5 **LIMIT FOR ANY ONE VEHICLE UNDER ANY**
6 **INSURANCE PROVIDING COVERAGE ON EITHER A**
7 **PRIMARY OR EXCESS BASIS.**

8 (ECF No. 23 at 5 (emphasis in original)). Plaintiff filed a claim for uninsured motorist benefits
9 with defendant. (ECF No. 1-1 at 6). Defendant denied coverage due to the \$100,000 uninsured
10 motorist payment plaintiff received from State Farm. (ECF No. 23 at 5).

11 Plaintiff filed the instant action in state court on November 26, 2018, alleging five causes
12 of action: breach of contract, breach of the implied covenant of good faith and fair dealing,
13 declaratory judgment, bad faith punitive damages, and intentional infliction of emotional
14 distress. (ECF No. 1-1). Defendant removed the case to this court on January 1, 2019. (ECF
15 No. 1).

16 On May 13, 2019, the court dismissed plaintiff's declaratory judgment, bad faith punitive
17 damages, and intentional infliction of emotional distress claims. (ECF No. 18 (granting
18 defendant's motion to dismiss in part)). Defendant now moved for summary judgment on
19 plaintiff's two remaining claims. (ECF No. 23).

20 **II. Legal Standard**

21 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
22 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
23 any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a
24 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment
25 is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S.
26 317, 323-24 (1986).

27 For purposes of summary judgment, disputed factual issues should be construed in favor
28 of the nonmoving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to
withstand summary judgment, the nonmoving party must "set forth specific facts showing that
there is a genuine issue for trial." *Id.*

1 In determining summary judgment, a court applies a burden-shifting analysis. “When the
2 party moving for summary judgment would bear the burden of proof at trial, it must come
3 forward with evidence which would entitle it to a directed verdict if the evidence went
4 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the
5 absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage*
6 *Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

7 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
8 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an
9 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
10 party failed to make a showing sufficient to establish an element essential to that party’s case on
11 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If
12 the moving party fails to meet its initial burden, summary judgment must be denied and the court
13 need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.
14 144, 159–60 (1970).

15 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
16 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
17 *Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a dispute of
18 material fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,
19 809 F.2d 626, 631 (9th Cir. 1987). It is sufficient that “the claimed factual dispute be shown to
20 require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.*

21 In other words, the nonmoving party cannot avoid summary judgment by relying solely
22 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d
23 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
24 allegations of the pleadings and set forth specific facts by producing competent evidence that
25 shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

26 At summary judgment, a court’s function is not to weigh the evidence and determine the
27 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby,*
28 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all

1 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
2 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
3 granted. *See id.* at 249–50.

4 The Ninth Circuit has held that information contained in an inadmissible form may still
5 be considered for summary judgment if the information itself would be admissible at trial.
6 *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253
7 F.3d 410, 418–19 (9th Cir. 2001) (“To survive summary judgment, a party does not necessarily
8 have to produce evidence in a form that would be admissible at trial, as long as the party satisfies
9 the requirements of Federal Rules of Civil Procedure 56.”)).

10 **III. Discussion**

11 “A breach of contract may be said to be a material failure of performance of a duty
12 arising under or imposed by agreement.” *Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240
13 (Nev. 1987). “An implied covenant of good faith and fair dealing exists in every Nevada
14 contract and essentially forbids arbitrary, unfair acts by one party that disadvantage the other.”
15 *Frantz v. Johnson*, 999 P.2d 351, 358 n.4 (Nev. 2000). In order to prevail on a bad-faith claim in
16 the insurance context, a plaintiff must show “the absence of a reasonable basis for denying
17 benefits and the defendant’s knowledge or reckless disregard of the lack of a reasonable basis for
18 denying the claim.” *Falline v. GNLV Corp.*, 823 P.2d 888, 891 (Nev. 1991) (quotation marks,
19 ellipses, and citation omitted).

20 The parties agree that the dispositive question before the court is whether plaintiff is
21 entitled to underinsured motorist benefits, the “other insurance” provision in her policy and the
22 \$100,000 payment from State Farm notwithstanding. (*See generally* ECF Nos. 23; 30).
23 Defendant’s most availing argument is that plaintiff is entitled to such benefits because her
24 “[p]olicy was provided on an excess basis, not on a primary basis, as the State Farm coverage
25 was purportedly rendered.” (ECF No. 30 at 14). Thus, by defendant’s estimation, defendant
26 “was required to pay its proportional share of what was owed in *excess coverage*, and because it
27 was the only insurer with excess coverage liability in this matter, it was required to pay all the
28 excess liability—up to its limit of \$100,000.” *Id.*

1 Defendant's argument falls short in light of the unambiguous language of plaintiff's
2 policy. The policy's "other insurance" provision specifically provides that plaintiff may not
3 recover for damages in excess of the highest applicable limit "on either a primary or excess
4 basis." (ECF No. 23 at 5). Both McCann's State Farm policy and plaintiff's policy had a
5 \$100,000 policy limit. *Id.* at 4. Plaintiff concedes that State Farm paid her its \$100,000 policy
6 limit. (ECF No. 30 at 5). Accordingly, defendant was under no obligation to pay plaintiff any
7 amount under the policy.

8 Thus, summary judgment is appropriate as to plaintiff's breach of contract claim.
9 Because defendant properly denied coverage, there is not an "absence of a reasonable basis for
10 denying benefits," and summary judgment is also appropriate as to that claim. *See Falline*, 823
11 P.2d at 891. The court grants defendant's motion in full.

12 **IV. Conclusion**

13 Accordingly,

14 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion for
15 summary judgment (ECF No. 23) be, and the same hereby is, GRANTED.

16 The clerk is instructed to enter judgment and close the case accordingly.

17 DATED March 23, 2020.

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UNITED STATES DISTRICT JUDGE